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No. 97-501

In The Supreme Court of the United States

October Term, 1997

RANDALL RICCI,

Petitioner,

vs.

ARLINGTON HEIGHTS, ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. IN SUPPORT OF NEITHER PARTY.

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**BRIEF AMICUS CURIAE
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This brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by respective Counsel for the Petitioner and Respondent. The letters of

consent have been filed with the Clerk of this Court, as required by the Rules.[1]

INTEREST OF *AMICUS CURIAE*

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the law enforcement effort more effective, in a constitutional manner. It seeks to improve the operation of the law enforcement and corrections functions to protect our citizens in their life, liberties, and property, within the framework of the various state and federal constitutions.

AELE has previously appeared as *amicus curiae* over 100 times in the Supreme Court of the United States and over 35 times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

Amicus is an educational organization representing the interests of law enforcement at the national, state, and local levels. Our constituents include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of executing and overseeing the process of making arrests within the bounds of the law; and (2) legal advisors who are called upon to advise law enforcement officers

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[1] As required by Rule 37.6 of the United States Supreme Court, the following disclosure is made: This brief was authored for the *amicus* by James P. Manak, Esq., counsel of record, and Wayne W. Schmidt, Esq., Executive Director, Americans for Effective Law Enforcement, Inc. No other persons authored this brief. Americans for Effective Law Enforcement, Inc., made the complete monetary contribution to the preparation and submission of this brief, without financial support from any other source, directly or indirectly.

and police and municipal administrators in connection with such matters, including the formulation and implementation of policy on the subject of arrests for minor offenses and infractions.

AELE maintains an independent posture, and will support only those law enforcement practices that conform to constitutional requirements. For example, in *Hudson v. McMillian*, 503 U.S. 1 (1992), we supported a prison inmate who sued correctional officers, arguing that recognition of his claim would discourage the use of minor, but excessive force by law enforcement and correctional officers.

STATEMENT OF THE CASE

Petitioner was the owner of a telemarketing business that sold advertising and conducted fundraising for a number of organizations, including a police union. In early 1994, the Arlington Heights, Illinois, police department began receiving complaints from citizens who were the targets of telephone solicitations conducted by petitioner's business. A detective investigated the business and determined that petitioner lacked a business license required by a village ordinance. The detective also discovered an outstanding warrant for the arrest of one of petitioner's employees. Thereafter, the detective and a fellow officer went to petitioner's place of business and arrested the employee pursuant to the warrant. At the same time, the officers searched some of petitioner's business papers, even though they had no warrant to do so, in hopes of finding material that would allow them to close down his business. The officers then asked petitioner if he had a business license and he confirmed that he did not. The officers summarily arrested him for violating Section 9-201 of the Village of Arlington Heights Code of Ordinances, which makes it unlawful to operate a business without a license.

Pursuant to village policy, petitioner was taken to the

Arlington Heights police station and locked in an interrogation room for approximately one hour while the officers prepared an arrest sheet and a local ordinance complaint, and approved and issued a bond receipt. After the paperwork was completed, petitioner was released on a recognizance bond. His wife obtained the business license while he was in custody, and when his case came to court, the charges were dismissed upon presentation of the license. Petitioner alleged that the police knew when they arrested him that he would be released on bond, that he would purchase a business license, and that the charges would be dismissed.

Petitioner brought a three count complaint under 42 U.S.C. §1983 against the Village of Arlington Heights and the police officers who arrested him, alleging that the officers engaged in an unconstitutional search of the premises, arrested him without probable cause, and violated his civil rights by subjecting him to a full custodial arrest for committing a fine-only offense. The parties settled the first claim, and petitioner did not appeal from the trial court's dismissal with prejudice of the second claim. Thus, the only claim before the court below, the Seventh Circuit Court of Appeals, *Ricci v. Arlington Heights, Ill.*, 116 F.3d 288 (7th Cir. 1997), was the one attacking the village policy that requires a full custodial arrest for violations of the business license ordinance.

The Seventh Circuit affirmed the trial court, ruling that a full custodial arrest for violating a village ordinance that involved only a fine and not potential incarceration, which ordinance involved the operation of a business without a license, was reasonable within the meaning of the Fourth Amendment. The court noted the arrestee committed the offense in the officers' presence, he was facing a possible fine of tens of thousands of dollars, and the officers held him for only one hour, which was basically the length of time it took to process the paperwork associated with the arrest.

The court said the Fourth Amendment reasonableness requirement does not forbid full custodial arrest, without a warrant, for a violation of a city ordinance that does not involve a breach of the peace and that is punishable only by fine, as long as the arresting officer has probable cause to believe that the arrestee has committed or is committing the offense, and state or municipal law authorizes the arresting officer to effect a custodial arrest for that offense.

The court noted that the Illinois common law rule that allowed an arrest for a misdemeanor committed in the presence of an officer only if that crime constituted a breach of the peace has been relaxed by statute, Ill. Stat. 725 ILCS 5/107-2 (1994), to include arrests for offenses other than breaches of the peace. *Nielsen v. Village of Lake in the Hills*, 948 F. Supp. 786 (N.D. Ill. 1996).

The United States Supreme Court granted certiorari on the issues:

(1) Does Fourth Amendment's Reasonableness Clause incorporate common-law rule prohibiting warrantless arrests in misdemeanor cases that do not involve breach of peace?

(2) May municipality, consistently with Fourth Amendment's Reasonableness Clause, require its police officers to make full custodial arrests for alleged violation of fine-only license ordinance "in order to ensure compliance with ordinance?"

SUMMARY OF ARGUMENT

Amicus takes the position that a citation procedure, rather than a full custodial arrest, in situations such as presented by this case, fully comports with the reasonableness requirements of the Fourth Amendment and is the preferred means of processing such a case. This question should not be resolved by a per se rule or a fixed municipal policy, but should depend

upon a number of factors presented by a particular case. Modern model codes have adopted and encouraged such citation procedures as alternatives to summary arrests for minor offenses. This Court should encourage the continuation of this process of modernizing the law of the states on the subject of arrest for minor offenses to comport with reasonableness requirements and best practices.

ARGUMENT

OFFICERS SHOULD BE REQUIRED TO USE A CITATION WHEN THEY ENFORCE PETTY OFFENSES, UNLESS THERE ARE CIRCUMSTANCES WHICH SUGGEST THAT A CUSTODIAL ARREST IS NECESSARY.

The court below, in approving the constitutionality of the procedure adopted by the police in this case, relied upon prior case law in the Circuit, *United States v. Trigg*, 878 F.2d 1037 (7th Cir. 1989). In *Trigg* the court said that the reasonableness of an arrest depends on the existence of two objective factors:

> First, did the arresting officer have probable cause to believe that the defendant had committed or was committing an offense. Second, was the arresting officer authorized by state and or municipal law to effect a custodial arrest for the particular offense. If these two factors are present, we believe that an arrest is necessarily reasonable under the Fourth Amendment. This proposition may be stated in another way: so long as the police are doing no more than they are legally permitted and objectively authorized to do, an arrest is constitutional.

United States v. Trigg, 878 F.2d at 1041.

Amicus submits, however, that the decision to make a custodial arrest for a minor offense should not be predetermined

by a per se rule, whether based on a statute or a municipal policy (as is present in this case). *See e.g.*, *People v. Scalisi*, 324 Ill. 131, 154 N.E. 715 (1926) (prior to modification represented by Ill. Stat. 725 ILCS 5/107-2 (1994)); *Commonwealth v. Wright*, 158 Mass. 149, 33 N.E. 82 (1893); *Kennedy v. State*, 139 Miss. 579, 104 So. 449 (1925); *Commonwealth v. Leet*, 537 Pa. 89, 641 A.2d 299 (1994).

Relatively few states have retained the common law rule, represented by the above cases that such an arrest can be made without a warrant only where a breach of the peace has taken place in the presence of the arresting officer, 40 B.U.L. Rev. 58, 71-73 (1960); LaFave, *Search and Seizure*, § 5.1(b), 13 (3d ed. 1995), and many statutes reflect the legislative design of the Illinois statute and the accompanying provisions dealing with Summons, Ill. Stat. 725 ILCS 5/107-11 (1994); Notice to Appear, Ill. Stat. 725 ILCS 5/107-12 (1994); Release on Own Recognizance, Ill. Stat. 725 ILCS 5/110-2 (1994); and Taking of Bail by Peace Officer, Ill. Stat. 725 ILCS 5/110-9 (1994). *See* Schroeder, "Warrantless Misdemeanor Arrests and the Fourth Amendment," 58 Mo. L. Rev. 771, 777-84 (1993).

Amicus takes no position on whether the common law rule is necessarily subsumed by the Fourth Amendment Reasonableness Clause, as this Court decided in *Wilson v. Arkansas*, 115 S. Ct. 1915 (1995), in the context of the knock and announce requirement. But we do note that the Court has wisely eschewed the adoption of inflexible, so-called "bright line" rules, in favor of objective reasonableness based upon the totality of the circumstances. *See, e.g.*, *Wilson v. Arkansas*; *Whren v. United States*, 116 S. Ct. 1777 (1996); *Ohio v. Robinette*, 117 S. Ct. 417 (1996); *Maryland v. Wilson*, 117 S. Ct. 882 (1997); *Richards v. Wisconsin*, 117 S. Ct. 1416 (1997).

Model code development has supported this trend, and in doing so has clearly opted for a non-summary arrest procedure unless extenuating circumstances dictate a summary arrest.

For example, the Model Code of Pre-Arraignment Procedure (ALI: 1975) adopts the position in § 120.1(1), that an officer may arrest for a misdemeanor without a warrant if he has reasonable cause to believe that the person committed it in his presence or merely if he has reasonable cause to believe that the person committed it, but in the latter instance it is also required that "the officer has reasonable cause to believe that such person (i) will not be apprehended unless immediately arrested; or (ii) may cause injury to himself or others or damage to property unless immediately arrested."

The code goes on to provide a procedure for the use of a citation in lieu of an arrest without a warrant:

> Section 120.2. Citation in Lieu of or in Connection with Arrest Without a Warrant
>
> (1) Citation Without Arrest. A law enforcement officer acting without a warrant who has reasonable cause to believe that a person has committed an offense may, subject to the regulations to be issued pursuant to Subsection (4) of this Section, issue a citation to such person to appear in court in lieu of arresting him.
>
> (2) Citation After Arrest. A law enforcement officer who has arrested a person without a warrant may, subject to the regulations to be issued pursuant to Subsection (4) of this Section, issue a citation to such person to appear in court in lieu of taking him to a police station as provided in Section 120.9.
>
> (3) Procedure for Issuing Citations. In issuing a citation hereunder the officer shall proceed as follows:
>
> (a) He shall prepare a written citation to appear in court, containing the name and address of the cited person and the offense for which the citation is issued, and stating when the person shall appear in court. Unless the person requests an earlier date, the time specified in the citation to appear shall be at least three days after the issuance of the citation.

> (b) One copy of the citation to appear shall be delivered to the person cited, and such person shall sign a duplicate written citation which shall be retained by the officer.
>
> (c) The officer shall thereupon release the cited person from any custody.
>
> (d) As soon as practicable, one copy of the citation shall be filed with the court specified therein, and one copy shall be delivered to the prosecuting attorney.
>
> At least 24 hours before the time set in the citation for the cited person to appear, the prosecuting attorney, or other person authorized by law to issue a complaint for the particular offense, shall either issue and file a complaint charging such person with an offense, or file with the court and deliver to such person a notice that a complaint has been refused and that such person is released from his obligation to appear. [Any person who wilfully violates a citation to appear in court hereunder is guilty of a misdemeanor.]

Model Code of Pre-Arraignment Procedure (ALI: 1975). *Also see* § 130.2(1)(b), and the Commentary thereto, p. 338, *et seq.*

A similar approach is found in the Uniform Acts, Rules of Criminal Procedure, Procedures Before Appearance (Approved Draft 1974), Rules 211, 221, 222, and the ABA Standards, Pre-trial Release, 1.1., 2.2(c)ii (Approved Draft 1968).

The point we wish to underscore is simply that a police officer's decision whether to make a summary arrest for a minor offense should depend upon many factors–whether embodied in a statute or a department policy–including such things as:

(1) Whether the offense involves a matter of public safety, including a breach of the peace or threatening behavior;

(2) Whether the offender's identity is known and verifiable;

(3) Whether nontestimonial evidence is needed, such as a driver's blood alcohol concentration;

(4) Whether the offender is a resident of the area;

(5) Whether the offender is likely to repeat his or her law violations unless summarily arrested (*e.g.*, disrupting First Amendment activity at an abortion clinic or civil rights demonstration);

(6) Whether the offender has a history of failing to respond to citations and summonses;

(7) Whether the offender may be in need of medical assistance or may be in a predicament where the officer may have a civil duty to protect the offender (*e.g.*, a pedestrian on a busy highway or in a dangerous neighborhood), etc.;

(8) Whether the officer may have a community caretaking function to perform in connection with an offender, (*e.g.*, preserving the offender's property, safeguarding unattended children, etc.).

Amicus does not propose this list as exhaustive, and refers the Court to the several factors listed in the model codes and their commentaries. We note as well, that in applying a list of factors in such situations, there is a danger that the homeless and other disadvantaged persons are less likely to qualify for a citation or immediate release. Legislatures and the courts must be sensitive to this problem. Police administrators should be mindful of this concern when they adopt written policies and design training programs.

Our point, however, is simply that a per se rule on the subject before the Court is not required by the Fourth Amendment Reasonableness Clause nor desirable from a judicial policy standpoint. *Wilson v. Arkansas*; *Whren*; *Robinette*; *Maryland v. Wilson*; *Richards*; *supra*. We believe the states should be encouraged to adopt flexible procedures for such arrests within the parameters of objective reasonableness, using the model codes as examples and existing state statutes incorporating various code features as models. We would not tie the hands of police and prosecutors in exercising reasonable

discretion in weighing relevant factors in making the decision whether an arrest warrant, summons, or a summary arrest is the preferred choice in a particular case.

The real vice in the present case is the use of an inflexible municipal policy to make a summary arrest for a simple ordinance violation. The violation of the ordinance by petitioner was open and notorious (he admitted to it) and involved no breach of the peace or danger to the public. In fact, *this was a mere business ordinance*.

There was simply no necessity to make a summary arrest in this case, and a referral to existing Illinois statutes dealing with arrest warrants (Ill. Stat. 725 ILCS 5/107-9) and summonses (Ill. Stat. 725 ILCS 5/107-11), even in the absence of a code-driven list of criteria found in a statute, makes it clear that the arrest and detention of petitioner in this case was an abuse of the discretion found in the Illinois statutes and objectively unreasonable under the Fourth Amendment for purposes of liability under 42 U.S.C. § 1983.

Under the Illinois statutes the authorities could readily have applied for an arrest warrant for the petitioner and the issuing court could have substituted a summons in lieu of a warrant. It can be inferred that the authorities had some "special agenda" in mind for the petitioner to make a completely unnecessary summary arrest for a business license violation and detain him against his will for an hour in an interrogation room while the booking paperwork was completed. It is just this kind of high-handed and arbitrary action that impels *amicus* to urge this Court to place restraining limits on the police in making warrantless arrests for minor offenses and infractions.

As law enforcement administrators and legal advisors, AELE believes that a reversal of the court below will hasten the adoption of flexible and reasonable statutes and policies on the subject of warrantless arrests for minor offenses. Such a

decision will further the adoption of progressive statutes and law enforcement policies on the subject for the benefit of all our citizens, and will at the same time advance the cause of effective law enforcement.

CONCLUSION

Amicus urges this Court to reverse the decision of the court below on the basis of the precedents of this Court and sound judicial policy.

Respectfully submitted,

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